No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES, PETITIONER

v.

THE THAYER-WEST POINT HOTEL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF IN OPPOSITION

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Statement	1
Argument	4
Point I	4
Point II	7
Point III	8
Conclusion	10

CITATIONS.

Cases:

	PAGE
Brooks-Scanlon v. *United States*, 265 U. S. 106	4
Jacobs v. *United States*, 290 U. S. 13	8
Liggett & Meyer v. *United States*, 274 U. S. 215	6
New York Rayon Company v. *United States*, 64 Fed. Supp. 684	8
Phelps v. *United States*, 274 U. S. 341	5, 7
Seaboard Air Line Ry. Co. v. *United States*, 261 U. S. 299	8
Shoshone Tribe v. *United States*, 299 U. S. 476	6, 7
Smyth v. *United States*, 302 U. S. 329	6
Thayer-West Point Hotel Company v. *United States*, 64 Fed. Supp. 565	1
United States v. *Creek Nation*, 295 U. S. 103	6, 7
United States v. *Goltra*, 312 U. S. 203	6, 7
United States v. *North American Company*, 253 U. S. 330	7

Statutes:

Act of February 13, 1925, Sec. 3(b), 28 U. S. C. 288 b.	1
Act of March 30, 1920, 41 Stat. 538, 548	2
Judicial Code Sec. 145	3, 5
Judicial Code Section 177 (a)	7

UNITED STATES CONSTITUTION:

Fifth Amendment	8

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Opinion Below.

The opinion of the Court of Claims and the Findings of Fact and Conclusions of Law are set forth in the record (R. 21-38). The opinion has been reported in *Vol. 64 Fed. Supp. 565.*

Jurisdiction.

The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925 as amended 28 U. S. C. 288(b).

The judgment of the Court of Claims was entered on March 4, 1946 (R. 38).

Statement.

On March 10, 1943, the United States Government took over the Hotel and all the equipment owned and then being operated by the respondent The Thayer-West Point Hotel Company (Finding 19, R. 29). The Hotel was

located on the Military Reservation at West Point and had been built and was being operated at the time of its taking under a fifty-year term lease with the Government. It had been built and was operated entirely at the expense of the lessee and his successors.

The term of the lease did not expire until October 17, 1974 (R. 6). The lease, however, contemplated and provided for a possible termination prior to the expiration of the term, and in such event it provided "just compensation shall be made to the party of the second part or his assigns for the construction of said Hotel, appurtenances and equipments" (R. 11). This was in accordance with the statute pursuant to which the lease had been entered into between the Secretary of War and the lessee by Act of March 30, 1920 (41 Stat. 538, 548) which reads as follows:

> "That the Secretary of War is hereby authorized to lease land on the United States Military Reservation at West Point, for a term of not exceeding fifty years, to any corporation, company, or individual, upon which to erect a hotel, and all other necessary buildings in connection therewith, in accordance with plans and specifications submitted to and recommended by the Superintendent of the Military Academy, and approved by the Secretary of War. Said lease shall contain such conditions, terms, reservations and covenants, as may be agreed upon and shall also provide for just compensation to the lessees for the construction of said hotel, appurtenances, and equipments, to be paid to said lessees at the termination of said lease."*

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* The provision of the lease referred to in the note in the petitioner's brief (p. 13) only applied to the termination of the lease by expiration of the term, but was not applicable to the termination of the lease prior to expiration. At the time of the taking by the Government and the consequent termination of the lease, it had 31 years to run.

The Hotel Company, shortly after the taking of its property by the Government, brought this action in the Court of Claims to recover "just compensation for the construction of said Hotel, appurtenances and equipments." The action was brought under the authority of Section 145 of the Judicial Code, which was formerly known as the Tucker Act, and which provides in part as follows:

> "Jurisdiction—The Court of Claims shall have jurisdiction to hear and determine the following matters: (1) Claims against United States. First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable: * * *"

The Court of Claims found "a fair and reasonable value" of the Hotel and equipment as of March 10, 1943, the date of the taking, to be $867,682.00 (R. 32, Finding 27).

No review is sought by the Petitioner herein of that finding.

The Court of Claims found, in addition to the said amount constituting the fair and reasonable value of the Hotel and equipment on March 10, 1943, that an additional amount should be paid represented by a computation of four per cent (4%) per annum on the fair and reasonable value from March 10, 1943, until the date of payment in order to give "just compensation".

In its conclusion of law the Court below expressly stated that this four per cent (4%) per annum was awarded "not as interest but as a part of just compensation" (R. 32).

At all times since the date of taking the Government has continued in possession and has operated the Hotel and its equipment (R. 29).

During this period the first mortgage on the Hotel property is outstanding and interest thereon is accruing and unpaid.

Argument.

The Petitioner has specified four errors which it seeks to review but which may be resolved into this one narrow question:

Whether the Court of Claims was empowered to award an additional sum, measured by way of computation of interest, to cover the period from the date of taking to the date of payment, in order to give the Hotel Company "just compensation" as provided by the statute and the lease.

POINT I.

The question whether the Court of Claims may make an allowance of interest not as interest but as "just compensation" has been definitely settled by several decisions of this Court.

Since 1923 there have been at least six decisions by this Court supporting the allowance of interest in the Court of Claims when the award called for "just compensation."

In *Brooks-Scanlon* v. *United States*, 265 U. S. 106, a ship under process of construction was requisitioned by the Government under an act authorizing the payment of just compensation but it made no provision for interest. This Court in holding that interest could be allowed said:

> "It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. And if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added."

Then came the decision in *Phelps* v. *United States,* 274 U. S. 341, in which this Court thoroughly considered the question of interest in the Court of Claims. In that case the Court of Claims rendered an award for the value of the use of a pier on which petitioner had a lease and which was requisitioned by the Secretary of War under an Act of Congress. The petitioner vacated the property and the United States took possession. Petitioner contended that to the value of the property found as of the day of taking, should be added such sum as would produce the equivalent of the use of the lease or property paid contemporaneously and that interest at a reasonable rate from the date of the taking to the time of payment is a good measure of the amount to be added in order to make "just compensation". It is noted that the action in the Court of Claims was brought under Sec. 145 of the Judicial Code. The Court of Claims refused to allow interest. This Court reversed the Court of Claims and held that a judgment in 1926 for the value of the property found in 1918 was not sufficient to constitute just compensation and said:

> "The Government's obligation is to put owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking."

Almost simultaneously with this decision in the *Phelps* case came the decision in *Liggett & Meyer* v. *United States*, 274 U. S. 215 where this Court reversed the Court of Claims for refusing to allow interest as additional compensation. The Government had ordered tobacco under an act empowering the President to requisition war material and provided that "just compensation" would be paid. There was no mention in the Act of interest. This Court directly held that interest as an additional amount was allowable.

In *United States* v. *Creek Nation*, 295 U. S. 103, and *Shoshone Tribe* v. *United States*, 299 U. S. 476, both Court of Claims cases, interest was allowed where just compensation was awarded for the taking of lands. This Court held that the value of the land at the time of taking was not just compensation but that interest at a reasonable rate is a suitable measure by which to ascertain an additional amount.

This Court refused to allow interest in *Smyth* v. *United States*, 302 U. S. 329, a Court of Claims case, where the United States had redeemed certain of its bonds and suits were brought in the Court of Claims to recover on the interest coupons attached to the bonds. There was no question of "just compensation" in the case and the Court reaffirmed the rule that in the absence of contract or statute evincing a contrary intention interest does not run upon claims against the Government.

Then came the decision of this Court in *United States* v. *Goltra*, 312 U. S. 203, on which Petitioner seems to rely. The Court of Claims allowed interest which this Court reversed but the distinctions drawn by this Court plainly indicate that where there is a *tortious* taking interest will not be allowed as distinguished from a taking which is authorized and calls for "just compensation". This

Court showed that while there had been a tortious taking in *United States* v. *Creek Nation, supra,* and *Shoshone Tribe* v. *United States, supra,* there had been a ratification by Congress of the taking thus permitting allowance of interest, whereas in the *Goltra* case there was no such ratification.

The clear implication of the *Goltra* decision is that if there had not been a tortious taking the interest allowance would have been proper.*

POINT II.

Section 177 of the Judicial Code is not applicable to this case as the Court of Claims expressly held that it was making no award of interest as "interest".

That section does not apply to a "just compensation" case. Its inapplicability to a case like this was recognized by this Court in *Phelps* v. *United States, supra,* where it said in its opinion:

> "Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution."

As a well established general rule, interest is not allowed on claims against the Government. But in "just compensation" cases where an owner's property is taken over with authority by the Government, this Court has always recognized the propriety of awarding an additional amount

* United States v. North American Company 253 U. S. 330, cited by Petitioner was also a case of tortious taking and was so distinguished in later decisions.

measured by interest. (*Jacobs* v. *United States*, 290 U. S. 13; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299.)

The alleged "tendency" of the Court of Claims, which petitioner decries (p. 13), to allow interest as a part of just compensation is amply supported by the decisions of this Court.*

POINT III.

Where both the statute and the contract expressly provide for the payment of "just compensation" when the Government takes over the property, there can be no plausible distinction between that kind of just compensation and the just compensation which is intended to be given under the Fifth Amendment.

The petitioner concedes in its brief that "an award of damages under the Fifth Amendment for the taking of property includes interest from the date of taking if payment be delayed" (p. 11). Petitioner argues, however, that when Congress uses the words "just compensation" in the Statute, and when those same words were employed in the lease with the United States, they were not intended to be

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* The petition for a writ of certiorari in *New York Rayon Company* v. *United States* cited by Petitioner, page 13, has no bearing on this case and is not analogous to it in any way whatsoever. It is reported at 64 *Fed Supp.* 684. Suits were brought on two judgments issued by the United States Customs Court where payments of the judgments had been delayed because of the refusal of the Government to pay on the ground that the payee corporation had been dissolved. There was no contract or statute providing for the payment of "just compensation" involved in the case.

used in the sense in which they are used in the Fifth Amendment.*

The Petitioner cites no decisions which sustain this contention. We think that the decisions of this Court which we have cited establish the rule as above stated under our point.

We are unable to find any support for the Petitioner's statement in its brief that there was no element of "taking" in this case when the 19th Finding of Fact (R. 29) of the Court below reads:

> " * * * the Secretary of War for and in behalf of the defendant, acting through its agents and representatives and pursuant to the provisions of the lease, took over possession and occupation and management of the said hotel and all its properties, appurtenances, and equipment, and has ever since continued in possession, management, operation, and control of the same."

What constitutes a "taking" if this is not one?**

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* Before the Court of Claims the Government took a contrary position. It said in its brief, (p. 173) "We submit that when Congress uses the words 'just compensation' in an Act such as the Act of March 30, 1920, it must be considered, in the absence of a very strong showing of contrary intent, to have used them in the sense of eminent domain. . . . As we shall show, the use of the words 'just compensation' in the sense of eminent domain value is appropriate to the situation involved, and the legislative history of the Act of March 30, 1920, while admittedly not conclusive one way or another, certainly does not help plaintiff overcome the presumption that Congress did use those words in the eminent domain sense."

** The Government heretofore recognized a "taking" because it commenced a proceeding in condemnation in the United States District Court for the Southern District of New York (R. 30). It is also worthy of note that the Secretary of War considered this claim justiciable in a condemnation proceeding (R. 17).

There is nothing in the lease which required the Government as a matter of *contract* to take over the Hotel property. Its obligation was to pay "just compensation" *when* it took the property and when it so terminated the lease. There had to be a "taking" in order to terminate the lease before the expiration of its term.

The words "just compensation" have come to have a definite well established meaning under the decisions of this Court to the effect that the value of the thing taken from the time of taking to the date of payment, with an added amount to make the parties whole, is what constitutes "just compensation".

Conclusion.

For the foregoing reasons, we respectfully submit that the petition herein for a writ of certiorari should be denied.

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